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NOTES

AN OBJECTIVE APPROACH TO OBSCENITY IN THE DIGITAL AGE

RYAN J. ADAMS[†]

INTRODUCTION

Philosopher Bertrand Russell once quipped, “Obscenity is whatever happens to shock some elderly and ignorant magistrate.”¹ Although Russell was an Englishman,² he highlights a problem that has plagued American obscenity doctrine for decades: subjectivity in definition.³ The current standard for obscenity, as set forth by the Supreme Court in *Miller v. California*,⁴ has been the subject of criticism for years, but is now, according to some critics, an anachronism.⁵ The *Miller* test for obscenity looks to three factors:

- (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work

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¹ *Thoughts on the Business Life*, FORBES, Dec. 10, 1990, at 328.

² RAY MONK, BERTRAND RUSSELL: THE SPIRIT OF SOLITUDE, 1872-1921, at 4 (1996).

³ See *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part) (“[T]he intractable obscenity problem.”). See also *Miller v. California*, 413 U.S. 15, 22 (“[N]o majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States’ police power.”).

⁴ 413 U.S. 15 (1973).

⁵ See Dennis W. Chiu, Comment, *Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185, 204, 215 (1995) (noting that “[w]hen *Miller* was decided in 1974, the nation had yet to widely use much of the modern telecommunications equipment we have today” and arguing that “[t]he existence of local community standards has either become extinct or is about to enter extinction because of society’s growing interconnectedness”).

depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁶

While criticisms of *Miller* are legion, this Note devotes itself to the peculiarities of the first prong. As interpreted, the first prong of this test means a “local community standard,” rather than a larger, national standard. Indeed, the *Miller* opinion declared that a “national” standard would be “unascertainable.”⁷ The prevalence of Internet pornography and its technical nature, however, have created a landscape vastly different from the pornography of *Miller*. When *Miller* was decided, in 1973, pornography was distributed mostly by mail-order or brick and mortar shops. Today, the overwhelming majority of pornography is distributed through a medium that was far from the contemplation of the justices in *Miller*: the Internet. The widespread adoption of the Internet as the primary means for transmitting pornography has changed not only the business of pornography, but how it is viewed in society.

Over the past decade, hardcore pornography has enjoyed an unprecedented degree of cross-over mainstream success. Adult film stars now feature in mainstream television and movies,⁸ and explicit pornographic DVDs and magazines are available at convenience stores nationwide. This may be due to the sheer volume of pornography on the Internet, and the ease of accessibility. Simply put, pornography is more prevalent, accessible, and popular than ever.⁹ Now that Internet networks

⁶ *Miller*, 413 U.S. at 24 (internal citations omitted).

⁷ *Id.* at 31.

⁸ For instance, adult film star Sasha Grey recently appeared in Academy Award winning Director Steven Soderbergh's *The Girlfriend Experience*. See THE GIRLFRIEND EXPERIENCE (Magnolia Pictures 2009); see also DAVID FOSTER WALLACE, *Big Red Son*, in CONSIDER THE LOBSTER 3 (2006).

⁹ See Press Release, Optenet, More Than One Third of Web Pages Are Pornographic (June 16, 2010), available at <http://www.optenet.com/en-us/new.asp?id=270> (indicating that more than a third of websites on the internet are pornographic); *Statistics on Pornography, Sexual Addiction, and Online Perpetrators*, SAFE FAMILIES, <http://www.safefamilies.org/sfStats.php> (last visited Apr. 5, 2012) (“More than 70% of men from 18 to 34 visit a pornographic site in a typical month.”); Jason Palmer, *Porn Putting on its Sunday Best*, BBC NEWS, <http://news.bbc.co.uk/2/hi/technology/7845561.stm> (last updated Jan. 23, 2009) (analyzing relationship between social networking websites and pornography websites); *One in 10 Men Surf the Internet for Porn - and 40% of Those Peek at Saucy Pictures While Their Partner is in the Next Room*, DAILY MAIL (Nov. 10, 2010, 7:54

increasingly use high speed broadband connections, streaming video technology has grown, and hours of sexually explicit material are available to millions of people within seconds.¹⁰

The shift to Internet-based distribution models makes the criteria under which obscenity is measured, *Miller's* local "contemporary community standards,"¹¹ unworkable, non-probative, and anachronistic. It is impossible to ascertain a "local community" for material on the Internet, a global network. This issue has been taken up not only by numerous commentators,¹² but by courts as well.¹³ In particular, many have argued for a standard that takes into account the "community" of the Internet, or a uniform "national" standard.¹⁴ But Internet community standards pose problems as well because the community of the Internet is geographically boundless. It comprises a truly global network. The *Miller* "local

AM), <http://www.dailymail.co.uk/news/article-1328369/1-10-men-surf-internet-porn-40-partner-room.html> (noting that 1 in 10 men surf the internet for pornography, and noting that 8 percent of surveyed males responded that they use the Internet primarily to view pornography); Dan Ackman, *How Big is Porn ?*, FORBES (May 25, 2001, 1:45 PM), <http://www.forbes.com/2001/05/25/0524porn.html> (analyzing different valuations of the pornography industry, all in multiple billions of dollars).

¹⁰ And it is often free to the dismay of traditional publishers and brick and mortar stores. Studies indicate that at least five of the top one hundred websites in America are "portals for free pornography." Sites like these attract more users than TMZ and Huffington Post, and even overshadow traditional mainstays of the illegal downloading community. See Ben Fritz, *Tough Times in the Porn Industry*, L.A. TIMES, Aug. 10, 2009, at B1 (describing the prevalence of free, online streaming pornography sites). These sites make most of their revenue in advertising and traffic, and have affected the overall pornography industry. See *id.* Old school powerhouses such as Vivid Entertainment report revenues down by at least 20%, a figure that correlates directly to attendance at trade show events. *Id.*; see also WALLACE, *supra* note 8.

¹¹ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹² See, e.g., Chiu, *supra* note 5, at 188.

¹³ See, e.g., *United States v. Little*, 365 F. App'x 159, 162–63 (11th Cir. 2010); see also *United States v. Kilbride*, 584 F.3d 1240, 1251 (9th Cir. 2009).

¹⁴ See *Kilbride*, 584 F.3d at 1250–56; see also Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1656, 1672 (1995) (noting that a virtual community standard could be a solution to the obscenity problem); William D. Deane, Comment, *COPA and Community Standards on the Internet: Should the People of Maine and Mississippi Dictate the Obscenity Standard in Las Vegas and New York?*, 51 CATH. U. L. REV. 245, 292, 294–95 (2001) (arguing for a "virtual community standard"); Patrick T. Egan, Note, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community Standard of Cyberspace?*, 30 SUFFOLK U. L. REV. 117, 150–51 (1996) (arguing for the adoption of a "virtual community standard").

community standards” test has become problematic for at least three reasons. First, the current test encourages forum shopping.¹⁵ Second, the test is too subjective.¹⁶ How is one to determine what these relevant standards are? What size is the community one looks to? Third, and directly related to the problem of the most restrictive community, *Miller* has the potential to chill free speech.¹⁷ Pornography is only illegal when it has been defined as such, making obscenity little more than a legal conclusion. A pornographer in California has no way of knowing whether her conduct is criminally obscene to someone in Florida, and therefore is likely to not assert her rights at all. This is unfair because she is limited by the unknown—she cannot know the bounds of her legal rights. Moreover, she has done nothing to force her material upon Floridians, but is being pursued by over-vigilant prosecutors.¹⁸

As a result of these problems, courts are now reconsidering *Miller*. The Ninth Circuit Court of Appeals, in *United States v. Kilbride*,¹⁹ recently held that a “national community standards” test should apply to Internet pornography.²⁰ The Ninth Circuit’s adoption of a “national community standards” test is a step in the right direction. It alleviates the problems of forum shopping and chilled speech, and acknowledges the Internet as a medium which transcends local borders.²¹ While the Ninth Circuit approach should be lauded for recognizing that *Miller* is unworkable in the modern age, its “national standards” test poses many of the same problems of *Miller*. For example, the

¹⁵ See *infra* Part II.B.

¹⁶ See *infra* Part II.C.

¹⁷ See *infra* Part II.D.

¹⁸ Debra D. Burke, *Thinking Outside the Box: Child Pornography, Obscenity and the Constitution*, 8 VA. J.L. & TECH. 11, 37 (2003) (“[I]t is difficult for the sender to appreciate the standards for patent offensiveness of a distant community, or even to block access to would-be recipients in less tolerant communities.”).

¹⁹ 584 F.3d 1240.

²⁰ *Id.* at 1254 (“[A] national community standard must be applied in regulating obscene speech on the Internet . . .”).

²¹ While this recognition of the problem of *Miller* vis-à-vis the Internet may mark a new approach to obscenity jurisprudence, the Eleventh Circuit Court of Appeals declined to follow this interpretation shortly after in *United States v. Little*, 365 F. App’x 159, 164 (11th Cir. 2010) (“We decline to follow the reasoning of *Kilbride* in this Circuit. . . . [T]he *Miller* contemporary community standard remains the standard by which the Supreme Court has directed us to judge obscenity, on the Internet and elsewhere.”).

“national standards” test suffers from vagueness and subjectivity. Because the national standard fails to address the concern of subjectivity, it ultimately fails.

This Note proposes a new approach that borrows from the Eighth Amendment’s “evolving standards of decency” test. While not a complete departure in methodology from the *Miller* test, the language of “evolving standards of decency” would lend objectivity in a legal analysis of obscenity. The Eighth Amendment approach, which is similar in language and meaning to “contemporary community standards,” looks to objective indications for evidence of contemporary societal values.²² Because the Internet is a protean medium, and the punishment of obscenity is rooted in criminal law, this approach can lend necessary guidance to an obscenity analysis. Moreover, “evolving standards of decency” has been used explicitly to determine a national consensus.²³ It is not only applicable to the Eighth Amendment, but has been employed in recent decisions in the context of sexual privacy, as well.²⁴

Using an Eighth Amendment framework also opens the analysis to international law,²⁵ which is compelling, considering the Internet is a global medium. Although international comparisons have been criticized by scholars and the bench, most of these criticisms are aimed at the lack of guiding criteria in international analysis.²⁶ Implementing an objective methodology in determining which countries to compare can reduce

²² The Eighth Amendment offers protection against “cruel and unusual punishment[.]” U.S. CONST. amend. VIII. The Supreme Court has analyzed whether punishment exceeds the Eighth Amendment by looking to “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The standards of society are to be determined by looking to “objective factors to the maximum possible extent.” *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)).

²³ See *infra* Part IV.B.

²⁴ See *Lawrence v. Texas*, 539 U.S. 558, 562, 564 (2003). Further, there may be an argument in the fact that *Lawrence* essentially holds that morality is never a legitimate government interest. This would argue for allowing obscene material to be protected by the First Amendment, a position that this author leaves for others, and does not think the Supreme Court will support anytime soon.

²⁵ See *infra* Part IV.D.

²⁶ See David M. O’Brien, *More Smoke than Fire: The Rehnquist Court’s Use of Comparative Judicial Opinions and Law in the Construction of Constitutional Rights*, 22 J.L. & POL. 83, 93 (2006) (“Another standard that has invited the use of foreign legal sources . . . is that of the ‘evolving standards of decency that mark the progress of [our] maturing society’ when interpreting the Eighth Amendment’s ban on ‘cruel and unusual punishment’ vis-à-vis the death penalty.”).

subjectivism. In particular, this Note proposes using Professor Geert Hofstede's seminal study on multinational cultural values, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations Across Nations*,²⁷ ("Hofstede Study") to identify countries with similar moral values to America, making them relevant for comparison. The varying indices Hofstede employs create a substantially diverse cross section of values, normalizing the analysis. Using the Hofstede Study to identify countries that are similar to America in a variety of cultural indices can provide a varied, yet methodical, guideline for selecting countries against which to compare American law. This, in effect, creates a guided "international community" for analysis, while avoiding extreme outliers.²⁸

This Note argues for an objective approach to international comparative law using the Hofstede Study as a guideline. Part I charts the modern history of obscenity jurisprudence, starting with *Miller* and going up to the current circuit split. Part II analyzes the problems of *Miller* and its progeny. Part III briefly considers the problems of the Ninth Circuit's "national community" approach, applying arguments from Part II. Finally, Part IV identifies a methodology derived from the Eighth Amendment's "evolving standards of decency" test which uses objective criteria to guide the development of a national standard which is informed by international law.

I. "I KNOW IT WHEN I SEE IT. . . ." A BRIEF HISTORY OF OBSCENITY LAW IN AMERICA

First Amendment freedoms are among the most prized rights of United States citizens. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."²⁹ This right is incorporated to the individual States by the Fourteenth Amendment and judicial interpretation. Despite the relatively straightforward language of the Amendment, the Supreme Court has carved out different categories of "speech," some protected by the Amendment, and

²⁷ See generally GEERT HOFSTEDÉ, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* (2d ed. 2001).

²⁸ Some attempts have been made to define a relevant "virtual" or "Internet" community. This Note does not attempt this.

²⁹ U.S. CONST. amend. I.

others not.³⁰ Among the unprotected categories of speech are the “lewd and obscene.”³¹ While this categorical approach sounds simple enough, defining what is “obscene” has proven to be an arduous, if not Sisyphean, task.³²

This section analyzes this history and problems of defining “obscenity” in American jurisprudence. Part I.A notes the lead up to *Miller v. California*, and then examines that case and the introduction of the modern obscenity test. Part I.B highlights how the first prong of the *Miller* test has been interpreted, specifically noting that it does not utilize a “national” standard. Part I.C briefly explores how *Miller* has been used in the Internet age. Part I.D analyzes the Ninth Circuit’s eschewal of *Miller* as applied to the Internet in *United States v. Kilbride*, and explores the court’s analysis in doing so. Part I.E further explores the court’s analysis in *Kilbride*, specifically looking at the Ninth Circuit’s use of Supreme Court precedent in its decision.

A. *Miller v. California*

In the 1964 Supreme Court case *Jacobellis v. Ohio*,³³ Justice Stewart declared that defining obscenity was something that he could “never succeed in intelligibly doing.”³⁴ In the same case, Stewart devised a decidedly non-scientific test to identify hard-core pornography: “I know it when I see it.”³⁵

In the hopes of elaborating upon this imprecise standard, the Court re-examined the standard for obscenity in the case of *Miller v. California*.³⁶ The defendant in *Miller* was convicted by a jury for violating section 311.2(a) of the California Penal Code³⁷ for “knowingly distributing obscene matter.”³⁸ The defendant

³⁰ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (holding certain classes of speech as unprotected).

³¹ *Id.* at 572.

³² See *United States v. Little*, 365 F. App’x 159, 163 (11th Cir. 2010); *United States v. Kilbride*, 584 F.3d 1240, 1250 (9th Cir. 2009).

³³ 378 U.S. 184 (1964).

³⁴ *Id.* at 197 (Stewart, J., concurring).

³⁵ *Id.*

³⁶ See 413 U.S. 15, 16 (1973) (referring to “the intractable . . . problem” (quoting *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part))).

³⁷ See *id.* at 18 (noting that the relevant statute provided that “[o]bscene” means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest”).

³⁸ *Id.* at 16.

had a business of mass mailing advertisements for adult books,³⁹ and found himself arrested, charged with distribution of obscene material, and convicted of a misdemeanor, when an elderly woman received graphic and unsolicited brochures.⁴⁰

Acknowledging flaws in the Court's obscenity doctrine, and perhaps alluding to Justice Stewart's test, the *Miller* Court aimed to "formulate standards more concrete than those in the past."⁴¹ The Court stated that "no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation."⁴² It could agree only that this area of law was in flux.⁴³

Needing a workable standard, the Court devised the current test to determine whether a work was obscene. The Court decided that juries must look to:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁴⁴

B. Contemporary Community Standards Are Not Judged by a National Community

Having set forth a test for obscenity, the Court then had to clarify it. Turning to the "contemporary community standards" prong of its test, the Court concluded that a national standard could not apply to obscenity law.⁴⁵ The Court cited diversity of nationhood and state government as a primary reason for not articulating a national standard.⁴⁶ Moreover, the Court feared

³⁹ The Court referred to this as "euphemistically called 'adult' material." *Id.*

⁴⁰ *See id.* at 16–18 ("[A] situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials.").

⁴¹ *Id.* at 20.

⁴² *Id.* at 22.

⁴³ *See id.* at 23 ("This is an area in which there are few eternal verities.").

⁴⁴ *Id.* at 24 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972) (per curiam)).

⁴⁵ *See id.* at 30 ("[T]his does not mean that there are, or should or can be, fixed, uniform national standards . . .").

⁴⁶ *See id.*

that a national standard would be overly abstract.⁴⁷ This sentiment was not new; Chief Justice Warren in *Jacobellis v. Ohio* argued that a national standard would not be provable.⁴⁸ Drawing further on history, the Court looked to the tradition of allowing jurors to “draw on the standards of their community” for evidence of standards.⁴⁹ The Court ultimately held that “[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”⁵⁰

C. *Community Standards into the Information Age*

As applied, the *Miller* test has come to mean the standards of regional communities, which can be rather provincial.⁵¹ Subsequently, courts have uniformly held that obscenity should be judged by the standards of a local county.⁵² In the modern era, however, many have argued against the application of *Miller* to Internet pornography, urging for a broader standard.⁵³

Courts have been loath to adopt a broader standard. An oft-cited example of the current standard for Internet pornography is seen in the influential decision of *United States v. Thomas*.⁵⁴ In *Thomas*, the Sixth Circuit Court of Appeals considered whether the geographic intangibility of the Internet necessitated a national standard for the first prong of the *Miller* test.⁵⁵ In what could have been a step forward in recognizing the unique

⁴⁷ See *id.* (“[I]t would be unrealistic to require that the answer be based on some abstract formulation.”).

⁴⁸ 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting) (“I believe that there is no provable ‘national standard’ At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.”).

⁴⁹ See *Miller*, 413 U.S. at 30. Although this raises separate questions of introducing evidence and expert testimony.

⁵⁰ *Id.* at 32.

⁵¹ Matthew Towns, Note, *The Community Standards of Utah and the Amish Country Rule the World Wide Web*, 68 MO. L. REV. 735, 735 (2003) (describing communities as “usually smaller than a single state”).

⁵² See, e.g., *United States v. Various Articles of Obscene Merch.*, Schedule No. 2102, 709 F.2d 132, 135–37 (2d Cir. 1983) (applying New York City’s standard).

⁵³ See, e.g., Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL’Y 25, 25–27 (2004). But see Burke, *supra* note 18 (“[T]he application of the least tolerant community standards is the safest route”).

⁵⁴ 74 F.3d 701, 711 (6th Cir. 1996).

⁵⁵ *Id.*

characteristics of the Internet, the court failed and held that the standard of a local Tennessee community should apply.⁵⁶ The court refused to address defendants' claim that the unique attributes of the Internet required a new definition of "community."⁵⁷ This view has been consistently upheld since.⁵⁸

D. Toward a New Standard: The Ninth Circuit Adopts a National Obscenity Standard in United States v. Kilbride

Recently, in the 2009 Ninth Circuit Court of Appeals case *United States v. Kilbride*,⁵⁹ the Ninth Circuit carved a new path in the jurisprudence of obscenity, holding that a "national community standards" test should apply to obscenity charges arising from Internet pornography. The case dealt with the prosecution of Californian defendants who were in the business of sending unsolicited, pornographic emails.⁶⁰ Defendants were prosecuted under a federal Anti-Spam Act⁶¹ and charged with various offenses, including obscenity.

At trial, the District Court opened the door for a national standard, stating that "community standards is a broader inquiry . . . [that should be made] in the light of contemporary standards that would be applied by the average adult person in the community."⁶² While at first blush this sounds like the *Miller* test, the court went on to say, "Contemporary community standards are set by what is in fact accepted in the community as a whole; *that is to say by society at large* . . . and not merely by what the community tolerates nor by what some persons or groups of persons may believe . . ."⁶³ Moreover, the court instructed the jury that "'community' . . . is not defined by a precise geographic area. You may consider evidence of standards existing in places outside of this particular district."⁶⁴ Little

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *United States v. Little*, 365 F. App'x 159, 164 (11th Cir. 2010).

⁵⁹ 584 F.3d 1240, 1250 (9th Cir. 2009).

⁶⁰ *United States v. Kilbride*, 507 F. Supp. 2d 1051, 1055 (D. Ariz. 2007) (*Kilbride D*). This fact pattern is rather similar to *Miller* where defendants were from California, and were prosecuted for distributing unsolicited pornographic mail. See *Miller v. California*, 413 U.S. 15, 16–18 (1973).

⁶¹ *Kilbride I*, 507 F. Supp. 2d at 1055.

⁶² *Id.* at 1069.

⁶³ *Id.* (emphasis added).

⁶⁴ *Id.*

instruction was given on how this standard might be achieved, nor was any mention made of the potential lack of objective evidence of such standards. Defendants were convicted of fraud and conspiracy to commit fraud in connection with electronic mail, interstate transportation and sale of obscene materials, and conspiracy to commit money laundering.⁶⁵

On appeal, the Court of Appeals for the Ninth Circuit considered this instruction. Defendants argued that the district court erred in its jury instructions on the matter.⁶⁶ Defendants focused on the meaning of “contemporary community standards,” and argued that error lay in the expansion to “communities beyond their own . . . or of a global community.”⁶⁷ Defendants had two specific objections. First, they objected to the language used by the district, “that is to say by society at large, or people in general,” as an improper expansion of *Miller*.⁶⁸ Second, they objected to jury instructions that, “[t]he ‘community’ you should consider in deciding these questions is not defined by a precise geographic area,” arguing that this imprecise definition was improper.⁶⁹ According to the defendants, the district court neither complied with the proper *Miller* test, nor complied with a national definition.⁷⁰ The court instead created a vague middle ground.

The Court of Appeals found no error in either of these instructions.⁷¹ In reaching this conclusion, the court relied in part on *Hamling v. United States*,⁷² noting, “that the relevant community lacks a precise geographic definition follows directly from *Hamling*’s holding that the relevant community is not to be geographically defined in federal obscenity prosecutions, permitting the jury to apply their own sense . . . based on their own community,” to rebuke the defendants’ argument that a clear geographic definition must be given.⁷³ Further, the court

⁶⁵ See *United States v. Kilbride*, 584 F.3d 1240, 1244 (9th Cir. 2009).

⁶⁶ *Id.*

⁶⁷ *Id.* at 1247.

⁶⁸ *Id.* at 1248 (emphasis omitted).

⁶⁹ *Id.*

⁷⁰ *Id.* at 1247.

⁷¹ *Id.* at 1248 (“We conclude, applying the prevailing definition of contemporary community standards put forth in *Hamling*, that the challenged portions do not constitute prejudicial error.”).

⁷² 418 U.S. 87, 104–05 (1974).

⁷³ *Kilbride*, 584 F.3d at 1248 (citing *Hamling*, 418 U.S. at 104–05).

cited *Hamling* as support for “the entirely logical proposition that evidence of standards of communities outside the district may in a court’s judgment help jurors gauge what their own sense of contemporary community standards are.”⁷⁴ The court also held that “[t]he instruction’s references to ‘society at large’ and ‘people in general’ are also not objectionable” to rebut defendants’ argument that an improper expansion of *Miller* was given.⁷⁵

The Ninth Circuit based its rationale on the reasoning of Supreme Court cases involving obscenity, community standards, and the Internet. First, it looked to *Reno v. ACLU*,⁷⁶ a case where the Supreme Court invalidated provisions of the Communications Decency Act (“CDA”) as facially overbroad in violation of the First Amendment.⁷⁷ The court focused largely though on the “fractured decision”⁷⁸ in *Ashcroft v. ACLU*,⁷⁹ a 2002 Supreme Court case.

In *Ashcroft*, the Court reviewed the constitutionality of the Child Online Privacy Act (“COPA”), a law similar to the CDA.⁸⁰ Before reaching the Supreme Court, the Third Circuit held that COPA was facially overbroad because it identified material “harmful to minors” by a contemporary community standards test.⁸¹ This was problematic according to the Third Circuit because “[w]eb publishers are without any means to limit access to their sites based on the geographic location of particular Internet users.”⁸² The Supreme Court vacated this judgment, holding that COPA’s reference to “contemporary community standards” in defining what was harmful to minors did not alone

⁷⁴ *Id.* at 1249.

⁷⁵ *Id.*

⁷⁶ 521 U.S. 844 (1997).

⁷⁷ *See id.* at 877–79. The contended CDA provisions attempted to regulate obscene content on the Internet relying on “contemporary community standards” analogous to the *Miller* test. The Court, in finding the regulation overbroad, wrote, “[T]he community standards criterion as applied to the Internet means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message.” *Id.* at 877–78 (internal quotation marks omitted).

⁷⁸ *Kilbride*, 584 F.3d at 1252.

⁷⁹ 535 U.S. 564, 566 (2002).

⁸⁰ *See Kilbride*, 584 F.3d at 1252 (noting that COPA was a successor to the CDA).

⁸¹ *ACLU v. Reno*, 217 F.3d 162, 173–74 (3d Cir. 2000), *vacated sub nom.*, *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

⁸² *Id.* at 175.

render COPA unconstitutionally overbroad, but in plurality addressed the issue of the “contemporary community standards” test.⁸³

In a concurrence, Justice O’Connor wrote that “this case still leaves open the possibility that the use of local community standards will cause problems for regulation of obscenity on the Internet.”⁸⁴ According to O’Connor, “given Internet speakers’ inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients . . . may be entirely too much to ask”⁸⁵ Moreover, O’Connor explicitly urged that adopting a national standard would be “necessary . . . for any reasonable regulation of Internet obscenity.”⁸⁶

Justice Breyer took a similar view in concurrence. He agreed that the local community standard would impose the most stringent regulations, and would “provide the most puritan of communities with a heckler’s Internet veto affecting the rest of the Nation.”⁸⁷ He then interpreted COPA as applying a national standard.⁸⁸ The remaining Justices agreed with Kennedy, who agreed with O’Connor and Breyer that “national variation in community standards constitutes a particular burden on Internet speech” but did not see the need to apply this as a new standard.⁸⁹ Justice Stevens, the lone dissenter, argued that recognition of a national standard would not solve any problems because it would produce varied and inconsistent outcomes.⁹⁰

In *Kilbride*, the Ninth Circuit reasoned that the plurality holding in *Ashcroft* could be properly viewed as the “narrowest grounds” of decision and therefore, as good law.⁹¹ Because

⁸³ See *Ashcroft*, 535 U.S. at 580–81, 586.

⁸⁴ *Id.* at 587 (O’Connor, J., concurring). But see *id.* at 577–79, 584–85 (plurality opinion) (stating that “the variance in community standards across the country could still cause juries in different locations to reach inconsistent conclusions as to whether a particular work is ‘harmful to minors,’” but not finding a problem in this case because COPA was narrower than the CDA).

⁸⁵ *Id.* at 587 (O’Connor, J., concurring).

⁸⁶ *Id.* at 587.

⁸⁷ *Id.* at 590 (Breyer, J., concurring).

⁸⁸ *Id.* at 591.

⁸⁹ *Id.* at 597 (Kennedy, J., concurring).

⁹⁰ *Id.* at 607 n.3.

⁹¹ *United States v. Kilbride*, 584 F.3d 1240, 1253–54 (9th Cir. 2009) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position

Justice O'Connor's and Breyer's views were narrower than Thomas's and Kennedy's, the Ninth Circuit held that these "narrower" views applied. Moreover, the court held that "the Court has never held that a jury may in no case be instructed to apply a national community standard in finding obscenity."⁹² It therefore ultimately held that a national standard should be applied to Internet obscenity for the same reasons as identified in *Ashcroft*.⁹³

II. THE PROBLEM WITH *MILLER*

The Ninth Circuit's decision in *Kilbride* should be lauded as a step in the right direction, primarily because the traditional *Miller* test has become anachronistic. In light of modern obscenity prosecutions, the community standards prong of the *Miller* test is problematic for three reasons: (1) it encourages forum shopping; (2) it is vague and subjective; (3) and it is likely to chill free speech. These problems derive from a basic truth, that the Internet is wholly different from previous mediums in physical structure and potential scope. The Ninth Circuit's decision was based upon this in part.⁹⁴ This Section analyzes these problems. Part II.A describes the intrinsic inapplicability of the *Miller* test to the Internet, primarily focusing on how the technology that comprises the Internet is different from traditional print media, upon which *Miller* was founded. Part II.B describes the potential for abuse under *Miller*, showing how forum shopping is encouraged by *Miller*. Part II.C describes problems with *Miller* itself, notably how the language of the test

taken by those Members who concurred in the judgments on the narrowest grounds.'") (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

⁹² *Kilbride*, 584 F.3d at 1254. *But see* *Miller v. California*, 413 U.S. 15, 30 (1973) ("To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility.").

⁹³ *Kilbride*, 584 F.3d at 1255 ("[O]ur holding today follows directly from a distillation of the various opinions in *Ashcroft* . . ."). Although the Ninth Circuit was correct in identifying the need for a new approach to obscenity, most courts have not followed suit. *See, e.g.,* *United States v. Little*, 365 F. App'x 159 (11th Cir. 2010). In *Little*, the court explicitly declined to follow *Kilbride*, instead sticking to *Miller*. *Id.* at 164.

⁹⁴ *Kilbride*, 584 F.3d at 1253 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 590 (2002) (Breyer, J., concurring) ("The technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious.")).

is vague, and leads to subjective interpretation. Part II.D describes how *Miller* has the potential to chill free speech, narrowing the rights of citizens.

A. *The Internet is Fundamentally Different from Print*

The technology of the Internet is remarkable in its growth and capacity to deliver content to users, which has been quite lucrative for the pornography industry.⁹⁵ Streaming video technology has led to a monumental expansion of pornography.⁹⁶ In 2006, there were approximately 4.2 million pornographic websites.⁹⁷ This number accounted for 12% of total websites on the Internet, and “every second, there are as many as 372 people searching adult terms online.”⁹⁸ That number is likely even higher today.⁹⁹ Annual pornography revenue is estimated at over \$13 billion.¹⁰⁰ As pornography expands, so does its reach to consumers and the potential for litigation. Obscenity law under *Miller* is a broken system, one described as “unpopular with the three most interested parties: anti-pornography advocates, federal prosecutors, and pornographers.”¹⁰¹

Internet pornographers have little to no control over where their material ends up.¹⁰² The Internet is made of intangible data. It is impossible for a user on one end to anticipate where his data will be accessed.¹⁰³ Applying a local standard to test

⁹⁵ See sources cited *supra* note 10.

⁹⁶ See Shannon Creasy, Note, *Defending Against a Charge of Obscenity in the Internet Age: How Google Searches Can Illuminate Miller’s “Contemporary Community Standards”*, 26 GA. ST. U. L. REV. 1029, 1031 (2010) (observing that “[t]echnological advances that allow pornographers to efficiently stream online video and view pictures have led to an explosion in the pornography market”).

⁹⁷ *Id.*

⁹⁸ *Id.* (internal quotation marks omitted).

⁹⁹ See, e.g., Matt Richtel, *What’s Obscene? Defendant Says Google Data Offers a Gauge*, N.Y. TIMES, June 24, 2008, at A1.

¹⁰⁰ See Creasy, *supra* note 96; Fritz, *supra* note 10 (describing Adult Video News as worth \$13 billion). But see Ackman, *supra* note 9 (noting that double digit billion dollar estimations of the pornography revenue may be overinflated, suggesting that a more approximate figure is in the low billions).

¹⁰¹ Michael J. Gray, *Applying Nuisance Law to Internet Obscenity*, 6 ISJLP 317, 323 (2010).

¹⁰² See Creasy, *supra* note 96, at 1042 (“[S]ellers operating on the Internet often have limited control over where their products end up. Items posted on the Internet are immediately available for viewing and downloading by users around the world.”).

¹⁰³ See *id.* (“[T]he Internet defies geographic boundaries, and it is still not possible for website operators to reliably and effectively limit access based on geographical location[s] . . .”).

whether something is “obscene” results in “individuals being prosecuted by the standard of the most restrictive community with access to the Internet.”¹⁰⁴ Pornography that has yet to be deemed “obscene” is legal,¹⁰⁵ but may be offensive to some potential user. Moreover, the Internet poses particular problems to *Miller*.

B. Forum Shopping

Of the most identifiable problems with *Miller* and the Internet is prosecutorial forum shopping.¹⁰⁶ The structure of the Internet, in conjunction with the *Miller* test, encourages forum shopping. Based on federal application of *Miller*, as seen through cases such as *United States v. Thomas*,¹⁰⁷ all one has to do to obtain jurisdiction over pornographers is access their websites. Prosecutors may bring suit anywhere materials are distributed. Because of the way the Internet operates, anywhere with Internet access is therefore a proper jurisdiction for suit.¹⁰⁸

The facts of cases like *Thomas* and *Little* illuminate the problems of forum shopping. In *Thomas*, Californian pornographers were prosecuted in Tennessee, although they never took any action to place their materials in Tennessee.¹⁰⁹ A postal inspector “logged into defendant’s bulletin board system in

¹⁰⁴ *Id.* (quoting John Tehranian, *Sanitizing Cyberspace: Obscenity, Miller, and the Future of Public Discourse on the Internet*, 11 J. INTELL. PROP. L. 1, 18 (2003)).

¹⁰⁵ As long as it complies with relevant state and federal law.

¹⁰⁶ Which can also be highly political. See Paul M. Barrett, *Multiple Jeopardy? Porn Defendants Face Indictments in Courts Far from their Bases*, WALL ST. J., July 27, 1990, at A1; Jim McGee, *U.S. Crusade Against Pornography Tests the Limits of Fairness*, WASH. POST, Jan. 11, 1993, at A1 (noting that the government’s “principal tactic against distributors of sexually explicit films . . . [is] the use of simultaneous or successive indictments in conservative jurisdictions around the country” with the intention of strong-arming distributors into cessation through the burden of pending litigation on multiple fronts); Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT’L L. 299, 324–25 (2008) (observing that, “In the United States today, federal obscenity prosecutions are sporadic, but arbitrary and highly politicized”); Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST, Sept. 20, 2005, at A21 (noting that Alberto Gonzales, Bush’s Attorney General, declared making obscenity prosecutions a top priority).

¹⁰⁷ 74 F.3d 701, 711 (6th Cir. 1996) (holding that obscenity may be prosecuted in any jurisdiction through which the allegedly obscene material passes).

¹⁰⁸ See Erik G. Swenson, Comment, *Redefining Community Standards in Light of the Geographic Limitlessness of the Internet: A Critique of United States v. Thomas*, 82 MINN. L. REV. 855, 880 (1998).

¹⁰⁹ See *id.* at 875. This is analogous to the situation seen in *Little*. See *infra* notes 125–29 and accompanying text.

California, scanned the information, and then selectively downloaded pictures into Tennessee. Significantly, it was the federal agent who purposely availed himself of the Tennessee community, not the defendant.”¹¹⁰ This was not an arbitrary decision, but one calculated to obtain conviction.¹¹¹

This is but one example of what is a common practice: “prosecutors . . . bringing charges only in conservative communities, where they have a greater chance of empanelling a jury that will judge sexually oriented materials obscene.”¹¹² Professor Clay Calvert details the problem in his analysis of “Project PostPorn,” a government operation to prosecute adult movie producers in the late 1980s and early 1990s.¹¹³ Under the auspices of “Project PostPorn,” Federal agents actively prosecuted Californian pornography producers in Bible Belt areas “in the belief that it [would] be easier to obtain convictions in conservative, rural America than in anything-goes Los Angeles.”¹¹⁴ According to a commentator, Project PostPorn was “aimed at ruining the business of mail-order operations selling sexually explicit—but not obscene—merchandise.”¹¹⁵ Moreover, the federal government acknowledges the use of forum shopping under “Project PostPorn.”¹¹⁶

¹¹⁰ Swenson, *supra* note 108, at 875.

¹¹¹ See *United States v. Blucher*, 581 F.2d 244, 245–46 (10th Cir. 1978) (discussing the problem of forum shopping for conservative communities where the defendants’ home domicile is more liberal), *vacated*, 439 U.S. 1061 (1979).

¹¹² Robert F. Howe, *U.S. Accused of ‘Censorship by Intimidation’ in Pornography Cases*, WASH. POST, Mar. 26, 1990, at A4.

¹¹³ See Clay Calvert, *The End of Forum Shopping in Internet Obscenity Cases? The Ramifications of the Ninth Circuit’s Groundbreaking Understanding of Community Standards in Cyberspace*, 89 NEB. L. REV. 47, 56–57 (2010).

¹¹⁴ See *id.* at 57 (quoting John Johnson, *Into the Valley of Sleaze: Demand is Strong, but Police Crackdowns and a Saturated Market Spell Trouble for One of L.A.’s Biggest Businesses*, L.A. TIMES MAG., Feb. 17, 1991, at 8, 10).

¹¹⁵ Calvert, *supra* note 113, at 57–58 (quoting Margaret A. Blanchard, *The American Urge To Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 821 (1992)).

¹¹⁶ See Calvert, *supra* note 113, at 64–65 (quoting Laurie P. Cohen, *Internet’s Ubiquity Multiplies Venues To Try Web Crimes*, WALL ST. J., Feb. 12, 2007, at B1) (“In fact, former United States Attorney Mary Beth Buchanan, who prosecuted [obscenity cases], has openly acknowledged that ‘the case could have been brought in any district in which the product was sold,’ but [was brought in a district that] ‘may be considered by some to be more conservative.’”).

Courts, too, have acknowledged the problem of forum shopping in obscenity cases.¹¹⁷ In one case, the court wrote that obscenity prosecutions “present[] an unusual, perhaps unique confluence of factors: substantial evidence of an extensive government campaign . . . designed to use the burden of repeated criminal prosecutions to chill the exercise of First Amendment rights.”¹¹⁸ Under this scheme, defendants’ fate relies on prosecutorial discretion. Moreover, even in the event of a favorable outcome, litigation is costly. In the case quoted above, where the judge admonished prosecutorial forum shopping, the “winner” ultimately spent \$3 million in legal fees battling the government.¹¹⁹

In a more recent example, *United States v. Extreme Associates, Inc.*,¹²⁰ Californian pornographers were prosecuted for obscenity in Pittsburgh, Pennsylvania.¹²¹ They were charged with “mailing three video tapes to an undercover United States postal inspector in Pittsburgh and delivering six digital video clips over the Internet to that same . . . inspector.”¹²² This inspector had ordered the tapes through Extreme Associates’ website and accessed the clips after purchasing a monthly membership—the inspector was the one who availed himself of the jurisdiction and material.¹²³ According to Calvert, “Given that southern California is the home of the adult movie industry in the United States[,] . . . it is not surprising that blue-collar-stereotyped Pittsburgh would be perceived as a more conservative and, in turn, more favorable venue . . .”¹²⁴ In *Extreme Associates*, the only reason that the defendants found

¹¹⁷ See, e.g., *United States v. P.H.E., Inc.*, 965 F.2d 848, 860 (10th Cir. 1992) (holding that “vindictive prosecution” is a legitimate grounds to overturn an obscenity conviction.).

¹¹⁸ *Id.* at 855.

¹¹⁹ Calvert, *supra* note 113, at 60–61; see also McGee, *supra* note 106 (noting that prosecutors use the tactic of forum shopping in hopes that “distributors would simply give up and agree to whatever terms of future conduct the prosecutors dictated, when faced with the expense and logistics of defending against a number of federal charges in different places, all at the same time”).

¹²⁰ 431 F.3d 150 (3d Cir. 2005).

¹²¹ *Id.* at 151–52. See Calvert, *supra* note 113, at 64.

¹²² *United States v. Extreme Assocs., Inc.*, No. 03-0203, 2009 U.S. Dist. LEXIS 2860, at *1–2 (W.D. Pa. Jan. 15, 2009).

¹²³ *Id.* at *2.

¹²⁴ Calvert, *supra* note 113, at 64–65; see also Joe Mozingo, *Obscenity Task Force’s Aim Disputed*, L.A. TIMES, Oct. 9, 2007, at B1 (“Prosecutors . . . frequently have picked Christian conservative areas to file.”).

themselves in Pittsburgh for trial was because the prosecutors effected a sting-type operation, and brought them there because of the conservative jury. Defendants had done nothing to solicit their materials to the good people of Pittsburgh, nor could they have had any expectation that they would be hailed to court there.

In the *Little* case, Paul Little, again, a Californian pornography producer,¹²⁵ was tried in Tampa, Florida.¹²⁶ Like *Extreme*, the prosecutors accessed the “obscene” material themselves and ordered it to a mailbox in their preferred venue.¹²⁷ One commentator observed that “[t]he Bush administration could have chosen any state in the Union, but engineered an indictment in Tampa—an open case of forum shopping for the most conservative jury pool it could find.”¹²⁸ Practices such as these cannot be dismissed as simple gamesmanship in the adversarial process; they are unfair because the defendant has no viable method of protecting his speech from being accessed in conservative communities.

¹²⁵ If this seems like *déjà vu*, it is because it is a notable trend. The majority of pornography originates in California, specifically the San Fernando Valley. This area has been referred to as “Porn Valley.” See Brad A. Greenberg, *Frisky Kitty Battle Lands in Judge’s Lap*, L.A. DAILY NEWS, July 17, 2006, at N1 (observing that the “San Fernando Valley [is] known to some as Porn Valley since it is home to most of the nation’s pornography industry”); Sharon Mitchell, *How To Put Condoms in the Picture*, N.Y. TIMES, May 2, 2004, at Section 4, 11 (“[T]he San Fernando Valley—or ‘Porn Valley’—[is] where much of the sex-film industry is based”); see also Fritz, *supra* note 10 (describing the effect that both the 2008 economic recession and the growth of online websites have had on the California pornography industry).

¹²⁶ See Calvert, *supra* note 113, at 65.

¹²⁷ Compare *Extreme Assocs.*, 2009 U.S. Dist. LEXIS 2860, at *1–2 (“[D]efendants have been charged with mailing three video tapes to an undercover United States postal inspector in Pittsburgh and delivering six digital video clips over the Internet to that same undercover postal inspector. The inspector ordered the video tapes through Extreme Associates’ publicly available website and accessed the video clips after purchasing a monthly membership to the members only section of Extreme Associates’ website.”), with *United States v. Little*, 365 F. App’x 159, 161 (11th Cir. 2010) (“As part of the investigation, the U.S. Postal Inspection Service office in Tampa ordered five DVD videos from the Appellants’ websites. The inspector entered a post office box in Tampa as her shipping address and the DVDs were subsequently shipped via U.S. mail.”).

¹²⁸ *James Madison Meets Max Hardcore: Florida Obscenity Case Could Force Review of Community Standards in Internet Age*, JONATHAN TURLEY.ORG (June 2, 2008), <http://jonathanturley.org/2008/06/02/little-indiscretion-florida-obscenity-case-could-force-review-of-community-standards-in-internet-age/>.

Because the micro-local standard applies,¹²⁹ the defendants cannot anticipate the ultimate judge of their speech even though it may be acceptable and legal in their home venue.

Forum shopping is encouraged under *Miller* because it loads the deck. Prosecutors have an incentive to vigilantly bring obscenity prosecutions because they can select forums that are more likely to convict. This mechanic incentivizes the persistence of discretionary prosecution, but there is no real "controversy." In most cases, no citizens in the jurisdiction complained; rather, they are used as a tool for prosecutors.

C. *Subjectivity/Vagueness*

Another problem with *Miller*, one that has followed the test since inception, is subjectivity: how to define and apply the test. As one pornographer described, "This is the only crime you don't know you did until the jury tells you you did it."¹³⁰ Jurors are instructed not to apply their own standards, but "the standards of the 'average person' in their community."¹³¹ The Court has noted that "a principal concern . . . is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."¹³² Of course, this is easier said than done. As ACLU President Nadine Strossen queried: "Can you honestly imagine doing anything other than invoking your own tastes and preferences?"¹³³ Juries, it is said, "apply their interpretations of local standards case-by-case in highly fact-specific rulings."¹³⁴ *Miller* doctrine is therefore inherently subjective; it is very unlikely that a typical juror will do anything other than rely on his own personal tastes and opinions.

¹²⁹ See *infra* Part II.C.

¹³⁰ Mazingo, *supra* note 124.

¹³¹ Cenite, *supra* note 53, at 35.

¹³² *Hamling v. United States*, 418 U.S. 87, 107 (1974).

¹³³ Cenite, *supra* note 53, at 36 (quoting NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* 53 (1995)).

¹³⁴ Cenite, *supra* note 53, at 51.

Vagueness is a recognized problem in law to the point that courts may void laws for vagueness.¹³⁵ In the *Miller* dissent, Justice Douglas wrote that “no more vivid illustration of vague and uncertain laws could be designed than those we have fashioned.”¹³⁶ Echoing many of the concerns of those in the pornography industry, Douglas maintained that due process would only be served if one were prosecuted for material that *had already* been deemed obscene.¹³⁷ The problems of vagueness are compounded and enhanced by the Internet. Problems arise in the context of “the vast number of communities whose standards may be applied and the rapidity with which new content is published, resulting in a staggering burden on content providers.”¹³⁸

The problem of vagueness is closely linked to the local community standard. Dawn Nunziato, a George Washington University Professor, writes, “*Miller* affirmatively establishes that local communities enjoy the prerogative to determine what sexually-themed expression is to be deemed obscene within their communities.”¹³⁹ A large part of this comes from the historical place of pornography and its tension with the law, a deeper foundational basis for *Miller* itself:

[T]he theory behind *Miller* is that since local communities are the ones that have to deal with the allegedly deleterious effects of the public display and sale of sexually explicit materials . . . it should be the local communities . . . that decide whether a particular movie, book or magazine is in fact obscene.¹⁴⁰

But this reasoning does not make sense in the context of the Internet. Most material must be affirmatively accessed, and in no means is on “public display.” Indeed, there are indications that the policy behind the obscenity exception may be outdated.

¹³⁵ See *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (holding that “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law”).

¹³⁶ *Miller v. California*, 413 U.S. 15, 41 (1973) (Douglas, J., dissenting).

¹³⁷ *Id.* at 42.

¹³⁸ Cenite, *supra* note 53, at 51–52.

¹³⁹ Dawn C. Nunziato, *Technology and Pornography*, 2007 BYU L. REV. 1535, 1540.

¹⁴⁰ Calvert, *supra* note 113, at 61–62 (quoting FREDERICK S. LANE III, *OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE* xx, (2001)).

Currently, there is no obligation for either side to enter evidence of a relevant community standard.¹⁴¹ It is presumed that juries will know the prevailing standard and that the material “speak[s] for itself.”¹⁴² In *Miller*, a police officer who had conducted a statewide survey testified as to community standards.¹⁴³ Indeed, many have argued for the use of surveys as objective evidence of community standards.¹⁴⁴

D. Chilling Speech

A defendant's inability to ascertain what is actually “obscene” in a given community, the vagueness of obscenity doctrine, and the very real threat of criminal prosecution lead directly to a chilling of free speech.¹⁴⁵ Moreover, because obscenity only exists after it has been deemed so, a pornographer wishing to distribute materials must take his chances at prosecution. Prior to *Miller*, Justice Brennan argued against a local approach because of its chilling effect, asserting that “[i]t would be a hardy person who would sell a book or exhibit a film anywhere in the land after this Court ha[s] sustained the judgment of one ‘community.’”¹⁴⁶ Justice Harlan wrote that local standards may have “the intolerable consequence of denying

¹⁴¹ Scot A. Duvall, *A Call for Obscenity Law Reform*, 1 WM. & MARY BILL RTS. J. 75, 92–95 (discussing the need to introduce objective evidence in obscenity trials); Creasy, *supra* note 96, at 1044 (observing that in obscenity prosecutions, “the State is not obligated to provide proof of the community standards” and that “[j]uries are presumed to already know the prevailing community standards”); Rebecca Dawn Kaplan, Note, *Cyber-Smut: Regulating Obscenity on the Internet*, 9 STAN. L. & POL'Y REV. 189, 192–93 (1998) (arguing for the need for surveys in obscenity trials, and describing how one could be implemented). *But see* Creasy, *supra* note 96, at 1054 (“[T]he State should be required to present evidence to prove the community standards.”).

¹⁴² *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6 (1973) (quoting *United States v. Wild*, 422 F.2d 34, 36 (1969)).

¹⁴³ *See Miller v. California*, 413 U.S. 15, 31 n.12 (1973).

¹⁴⁴ *See, e.g.,* Creasy, *supra* note 96, at 1047–48 (observing that “proponents of prosecutorial use of survey evidence have advised that a carefully crafted and conducted survey could be used for years across multiple trials, offering some protection in cases where courts require the State to provide evidence of the standard”); Kaplan, *supra* note 141.

¹⁴⁵ *See* Creasy, *supra* note 96, at 1052 (noting that “[a]n inability to define the community is unacceptable because it prevents the defendant from effectively exercising the right to present evidence to prove the community standard”).

¹⁴⁶ *Jacobellis v. Ohio*, 378 U.S. 184, 194 (1964).

some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency.”¹⁴⁷

An identifiable problem with *Miller* is what Professor Mark Cenite calls a “lack of specificity about the geographic community’s scope . . . because content providers cannot tell in advance who is included in a community with which they wish to communicate.”¹⁴⁸ Cenite compares the issue to the one before the Court in *Hamling*, involving mail. The Court in *Hamling* held prosecutions could be permitted in any district the obscene material passed through.¹⁴⁹ Justice Brennan, in dissent, wrote:

Under today’s “local” standards construction, . . . the guilt or innocence of distributors of identical materials mailed from the same locale can now turn on the chancy course of transit or place of delivery of the materials. National distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods may wander.¹⁵⁰

This principle “create[s] even heavier burdens on the Internet, a ‘packet’ network where parts of the same message may take different, unpredictable routes through computers all over the world before being reassembled at their destinations.”¹⁵¹ The net effect of imposing the standards of the most restrictive community on all communities is that it deprives the medium of diversity of expression and deprives adults of the right to access materials that would not violate their own personal standards, or the standards of their communities.¹⁵²

It has even been argued that we are currently operating under a *de facto* national standard, the national standard of the most restrictive community.¹⁵³ The most conservative

¹⁴⁷ *Manual Enters. v. Day*, 370 U.S. 478, 488 (1962).

¹⁴⁸ Cenite, *supra* note 53, at 35.

¹⁴⁹ *Hamling v. United States*, 418 U.S. 87, 143–144 (1974) (holding that jurisdiction could be obtained wherever mail was received); *see also* *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996) (holding that obscenity may be prosecuted in any jurisdiction through which the allegedly obscene material passes).

¹⁵⁰ *Hamling*, 418 U.S. at 144 (Brennan, J., dissenting) (citations omitted).

¹⁵¹ Cenite, *supra* note 53, at 39.

¹⁵² *Id.* at 56.

¹⁵³ Swenson, *supra* note 108, at 878 (“A local community standard leads to the lowest-common-denominator approach, whereby distributors market only material that conforms to the standards of the most sensitive community. This standard creates a *de facto* national standard that chills freedom of speech.”).

communities in the country are thereby forcing their values on the users of the Internet.¹⁵⁴ Cenite observes, "A national average standard has the virtue of preventing the least tolerant community from controlling the entire medium, and giving the least tolerant community the same influence on the national average as the most tolerant community."¹⁵⁵ These concerns were recently raised in the news when residents of Massachusetts filed an injunction to prevent a new expansive obscenity law from being passed, citing fear that it would chill free speech.¹⁵⁶

III. PROBLEMS WITH A NATIONAL STANDARD

Because of all the problems associated with *Miller*, the Ninth Circuit's approach in *Kilbride* is refreshing. The national standard, unfortunately, does not solve everything. Many have argued that given the size and diversity of the United States, a national standard is unascertainable.¹⁵⁷ Improperly applied, a national standard could be just as unworkable as the *Miller* test. Alternatively, a national standard may bring "new definitional and constitutional questions."¹⁵⁸ Any uniform, or national, standard would have to operate through objective guidelines to alleviate definitional problems and avoid repeating the vagueness of *Miller*.¹⁵⁹

¹⁵⁴ *Id.* at 878–79 (observing that the current, or lowest-common-denominator approach, "allows non-Internet users in the most conservative jurisdiction of the country to force their values not only upon the rest of the country, but also upon the world-wide community of Internet users.").

¹⁵⁵ Cenite, *supra* note 53, at 70.

¹⁵⁶ Denise Lavoie, *Groups Challenge Obscenity Law Scope*, BOS. GLOBE, Oct. 20, 2010, at Metro 2.

¹⁵⁷ *Miller v. California*, 413 U.S. 15, 33 (1973) ("People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."); Boyce, *supra* note 106, at 345 (noting that a national community of values toward obscenity "scarcely exists").

¹⁵⁸ Cenite, *supra* note 53, at 26, 57.

¹⁵⁹ See Randolph Stuart Sergeant, *The "Hamlet" Fallacy: Computer Networks and the Geographic Roots of Obscenity Regulation*, 23 HASTINGS CONST. L.Q. 671, 716 (1996) (positing that the replacement of "national" for "local" in a *Miller* analysis would not reduce the problems of *Miller*, including the chilling effect on speech, because "those speaking on national or international computer networks will still be unable to predict how every jury in every community will view the 'national' decency standard").

States' rights and concerns of federalism present problems. The *Miller* test and traditional approaches are "rationales with deep roots in the principles of federalism."¹⁶⁰ These concerns have been present since *Miller* came down. Federalism concerns also were present in *Miller*, where "[t]he Court warned . . . against resolving conflicts between states by *arbitrarily* depriving the States of . . . power."¹⁶¹ A national standard has also been described as, "strangling diversity of tastes and attitudes The median obscenity standard it would call for juries to create would wind up restricting speech deemed acceptable by many communities, while forcing other communities to accept speech that they deem highly objectionable."¹⁶² The net result could be a homogenization of diverse national culture and attitude. Perhaps more tellingly, citizens of conservative communities would be offended at the thought of a national cultural mandate forcing them to accept the cultural norms of more liberal communities like New York and Las Vegas.¹⁶³ These concerns are all the more present in modern times, where political matters are contentiously schismatic, and strong support exists in popular opinion for States' rights.

Any kind of solution must be concrete and objective. Most objections to a national standard are aimed at the potential ambiguity of such a standard.¹⁶⁴ Moreover, it is possible that the delineation of a "national" standard would be in effect the same as a local standard, because a juror cannot apply the standard of an unknown realm.¹⁶⁵ Even if a "national" standard were mandated, a juror would likely still apply his own beliefs.

¹⁶⁰ Cenite, *supra* note 53, at 32.

¹⁶¹ *Id.* at 58 (internal quotation marks omitted).

¹⁶² Calvert, *supra* note 113, at 84 (quoting David Johnson, U.S. v. Kilbride: *9th Circuit's Holding that Internet Obscenity Laws Should be Governed by a National Standard Rests on Shaky Grounds*, DIGITAL MEDIA LAWYER BLOG (Nov. 5, 2009), http://www.digitalmedialawyerblog.com/2009/11/us_v_kilbride_9th_circuits_hol.html (website no longer available)).

¹⁶³ Apparently a modern equivalent of Sodom and Gomorrah. *See* Miller v. California, 413 U.S. 15, 32 (1973).

¹⁶⁴ *See, e.g., Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1598 (1999) (warning of the "broadest definition of obscenity, potentially resulting in an alarming retreat to a national obscenity standard"); *see also* Cenite, *supra* note 53, at 70 ("If obscenity regulation is to continue in new media, the standard involved must be defined.").

¹⁶⁵ Calvert, *supra* note 113, at 77 ("[H]ow can a hypothetical juror from Louisville, Kentucky who has spent her entire life there, be expected to take into

Extrinsic evidence has been proffered as a solution, introducing objective forms of evidence to show the popularity of pornography, correlating this to acceptability. Many commentators have debated the issue, arguing that defendants should introduce evidence to establish standards, or force the prosecution to introduce objective evidence.¹⁶⁶ Internet searches have been analyzed as a possible form of objective evidence. In one case, a Florida man indicted on federal obscenity charges offered to use Google search engine data of his community to show that his material was not obscene.¹⁶⁷ The case settled out of court, but prompted at least one commentator to propose using Google data as relevant evidence.¹⁶⁸ This poses problems though because “if the national community standard for the Internet is to be judged by what is accepted on the Internet, then . . . a great deal of sexual content is widely accepted”¹⁶⁹ The results of such a method would be dubious at best, evidenced by the simple example that if search “hits” alone are a measure of acceptability, then “orgy” trumps “apple pie” by a country mile.¹⁷⁰

IV. PROPOSED ANSWER

The national standard delineated by the Ninth Circuit Court of Appeals is a good start. It effectively addresses the concerns of chilling of speech and forum shopping. Unfortunately though, it may be just as vague, if not more confusing, than the *Miller* test. Any forward-looking approach must take into account concerns of federalism, and limit subjectivity in definition and application. This section proposes a method whereby this is achieved. Part IV.A analyzes the problem of *Miller* at the most fundamental level—the text of the case itself—and argues that the language of the decision is flawed. Part IV.B introduces the “evolving

account the sexual values and mores of places like Austin, Texas; San Francisco, California; or anywhere else, for that matter?”).

¹⁶⁶ See Creasy, *supra* note 96, at 1054; Kaplan, *supra* note 141 (arguing for the need for surveys in obscenity trials, and describing how one could be implemented).

¹⁶⁷ See Creasy, *supra* note 96, at 1033–34; Monica Hesse, *The Google Ogle Defense: A Search For America's Psyche*, WASH. POST, July 3, 2008, at C1; Richtel, *supra* note 99.

¹⁶⁸ See Creasy, *supra* note 96, at 1054 (arguing that “the courts should allow either party to use new search engine tracking technology to illuminate the standards of the community.”).

¹⁶⁹ Calvert, *supra* note 113, at 78.

¹⁷⁰ See Richtel, *supra* note 99 (describing the relationship between search results for “apple pie” and “orgy”).

standards of decency” test and demonstrates that this test is actually a close relative of the *Miller* test. Part IV.C proposes methods for determining what the “evolving standards of decency” would be, mostly relying on the use of survey evidence. Part IV.D introduces an international comparative framework, first showing that the Supreme Court often relies on international law in determining “evolving standards of decency,” and then weighing the arguments against such an approach. Part IV.E in turn rejects the arguments against an international analysis, providing reliable objective guidelines for determining how to apply international law to national jurisprudence.

A. *Community Standards is Flawed Language and Should Be Replaced with Evolving Standards of Decency*

The text of *Miller* presents problems. Critics, jurists, and jurors alike have struggled with the meaning of “whether the average person, applying contemporary community standards, would find that the work, as a whole, appeals to the prurient interest.”¹⁷¹ Ignoring the issue of defining “prurient interest,” the “contemporary community standards” language is vague on its face. Superimposing a “national community standards” test does little to alleviate this problem. For this reason, the Eighth Amendment’s “evolving standards of decency” test suits the purpose better: it already presupposes a national inquiry, and it demands objective inquiry. It may be worth noting, too, that it has already been used in analyzing sexual privacy.¹⁷² Perhaps most importantly, it allows for international comparative analysis, something which is fundamentally suited for the Internet, because the Internet is a global medium.

The use of “evolving standards of decency” is not a major departure from current jurisprudence and the *Miller* test. In an essay on the conventional morality theory of judicial review, Wojciech Sadurski looks to the various judicial tests used to quantify a “moral majority.” Morality is considered and defined according to Sadurski by, “contemporary community standards,

¹⁷¹ See *supra* Part II.

¹⁷² See Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365, 372–73 (2009) (noting the similarity between the “evolving standards of decency” test and its methodology, and the court’s analysis in *Laurence v. Texas*).

community values, public morality . . . [and] evolving standards of decency.”¹⁷³ Sadurski notes that these standards are applied to obscenity.¹⁷⁴ In essence, these tests all serve the same purpose.

The tests both seek to ascertain the same goal: a majority view on a moral issue. Moreover, the Supreme Court has been known to use similar phrases interchangeably.¹⁷⁵ The purpose is the same, to “gaug[e] public temperament.”¹⁷⁶ Under the “evolving standards” doctrine, courts look to see whether a national consensus has developed against a punishment, using a majoritarian approach.¹⁷⁷ Roger Alford notes that “the very notion that ‘community standards’ should have constitutional import is a concession to majoritarianism.”¹⁷⁸

The “evolving standards of decency” language is not a panacea of course, and begs the question: whose evolving standards of decency? Indeed, the test has some aspects of ambiguity.¹⁷⁹ Part of the vagueness in these doctrines is necessary for allowing flexibility.¹⁸⁰ “Evolving standards” is useful because it calls for objective guidance. Specifically, the methodology of the Court in *Atkins v. Virginia*¹⁸¹ serves as a helpful guidepost. In *Atkins*, the Court used “evolving standards of decency” to determine whether to forbid the executions of mentally retarded criminals.¹⁸² The Court used the test to analyze legislation as an objective indication of these “evolving standards,” searching for a national consensus.¹⁸³ Because a

¹⁷³ WOJCIECH SADURSKI, MORAL PLURALISM AND LEGAL NEUTRALITY 38 (1990) (internal quotation marks omitted).

¹⁷⁴ *Id.* at 39.

¹⁷⁵ *Id.* at 38–39; Paige Connor Worsham, Note, *So Easily Offended? A First Amendment Analysis of the FCC's Evolving Regulation of Broadcast Indecency and Standards For Our Contemporary Community*, 6 FIRST AMEND. L. REV. 378, 404 (2008).

¹⁷⁶ See Worsham, *supra* note 175.

¹⁷⁷ Lain, *supra* note 172, at 366 (“[P]rohibiting a punishment only after a majority of states have already done so on their own.”).

¹⁷⁸ Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 685 (2005); Boyce, *supra* note 106, at 338 (implying that a reason for obscenity law in general is majoritarianism, contrasted with a Canadian rejection of this idea).

¹⁷⁹ See Worsham, *supra* note 175.

¹⁸⁰ *Id.*

¹⁸¹ 536 U.S. 304 (2002).

¹⁸² Worsham, *supra* note 175.

¹⁸³ *Id.*

national consensus is needed in obscenity law to combat the problems of *Miller* and the Internet, the application of “evolving standards of decency” is apt.

B. Determining the “Evolving Standards”

The use of evolving standards is admittedly a majoritarian doctrine. The fears of federalism advocates may be allayed in considering the history of Supreme Court jurisprudence, which reveals that “the Court routinely—and explicitly—determines constitutional protection based on whether a majority of states agree with it.”¹⁸⁴ Some have argued that First Amendment jurisprudence is no different, and is “chock full of line drawing and limitations, with examples of explicitly majoritarian decisionmaking [sic] at nearly every turn.”¹⁸⁵ Moreover, it has been said that the “contemporary community” standards test is nothing if not a “nose-counting” of the majority.¹⁸⁶ At a threshold level, the decision to exclude categories of speech from First Amendment protection turned upon majoritarian analysis.¹⁸⁷ From there, the exclusion of child pornography followed a similar methodology, taking into account state statutes.¹⁸⁸

Assuming that a majoritarian consensus is relevant in ascertaining “community standards,” or “evolving standards of decency,” the use of surveys can provide highly probative evidence of a national consensus.¹⁸⁹ A particularly useful piece would be the recently released survey, The National Survey of Sexual Health and Behavior (“NSSHB”). The NSSHB, a recently released survey by researchers at Indiana University, is the largest survey of sexual behaviors and attitudes in 20 years.¹⁹⁰ It

¹⁸⁴ Lain, *supra* note 172, at 365, 369 (opining that “[o]ver the past few years, the country’s top constitutional scholars have filled volumes of law reviews convincing us that the Supreme Court is an inherently majoritarian institution, and it is” (footnotes omitted)).

¹⁸⁵ *Id.* at 392.

¹⁸⁶ See Ernest A. Young, Comment, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 158–59 (2005).

¹⁸⁷ Lain, *supra* note 172, at 393.

¹⁸⁸ *Id.* at 394.

¹⁸⁹ See Calvert, *supra* note 113, at 61–62; Creasy, *supra* note 96, at 1052; *supra* note 141.

¹⁹⁰ See Carolyn Butler, *After 20 Years, the Sexual Landscape has Shifted*, WASH. POST, Nov. 16, 2010, at E2; Ctr. Sexual Health Promotion, NATIONAL SURVEY OF SEXUAL HEALTH AND BEHAVIOR, <http://www.nationalsexstudy.indiana.edu/> (last visited Apr. 7, 2012).

surveys a large sample size and quantifies types of sexual activity and attitudes.¹⁹¹ The NSSHB could be an excellent resource for starting an analysis of whether something is nationally acceptable. Although some surveys have been criticized due to their small sample size, the NSSHB is immune to such attacks because of its breadth and comprehensiveness, and is therefore a sound guide.¹⁹²

Many of the common targets of obscenity convictions are demonstrably acceptable by the NSSHB. In *Paris Adult Theatre I v. Slaton*,¹⁹³ the Supreme Court acknowledged that some thirty-one obscenity cases were determined by the Justices applying their own separate criteria of obscenity.¹⁹⁴ These criteria were anything but scientific; for example, Justice White deemed anything showing erections, intercourse, oral or anal sex, obscene.¹⁹⁵ Florida, a state often sought for obscenity prosecutions, has an obscenity statute decreeing anal and oral sex as “deviate sexual intercourse.”¹⁹⁶ The NSSHB lifts the veil of Americans’ private lives, however, showing that 88% of men aged 30–39 engaged in fellatio and that nearly half of 25–29 year olds have engaged in anal sex at least once.¹⁹⁷ With such large numbers, it is hard to make an argument that these activities are unacceptable by nature.

C. *International Comparative Analysis Framework*

The Internet, though, is not strictly confined to our national borders. For this reason, an international comparative analysis would be helpful and illustrative. Obscenity law is inseparable from international law, as the doctrine grew out of international analysis.¹⁹⁸ Informed not only by the history of American obscenity law, an international approach is valuable for shedding

¹⁹¹ See Butler, *supra* note 190.

¹⁹² See, e.g., Creasy, *supra* note 96, at 1049 (describing various instances where courts have rejected survey data).

¹⁹³ 413 U.S. 49 (1973).

¹⁹⁴ *Id.* at 82 n.8 (Brennan, J., dissenting).

¹⁹⁵ BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 232 (1979).

¹⁹⁶ FLA. STAT. ANN. § 847.001(5) (West 2008). This definition is still subject to the “contemporary community standards” test, but seems extremely suggestive. See *Haggerty v. State*, 531 So. 2d 364, 365 (Fla. Dist. Ct. App. 1988).

¹⁹⁷ See Jon Henley, *America Reveals its Sexual Secrets*, *THE GUARDIAN* (Oct. 5, 2010, 4:00 PM), <http://www.guardian.co.uk/lifeandstyle/2010/oct/05/sex-us-american-attitudes-survey?INTCMP=SRCH>.

¹⁹⁸ See *infra* Part IV.D.

light on obscenity doctrine because American jurisprudence is so fractured.¹⁹⁹ Moreover, international analysis has been used under “evolving standards” more frequently as of late, and can be narrowed objectively by guiding measures.

As a preliminary point, it should be noted that obscenity doctrine was instituted from international comparative inquiry. When the Court excluded obscenity from First Amendment protection it cited “the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.”²⁰⁰ This is an explicitly majoritarian exception: “[the Court] made a categorical ruling based on the one the states had made on their own.”²⁰¹ Therefore, disregarding the recent resurgence of international comparative analysis in constitutional law, obscenity doctrine itself is innately an international inquiry. Moreover, this applies with greater force to the Internet because the Internet is an international medium.

International inquiry has been used increasingly in constitutional analysis, particularly in determining “evolving standards of decency.”²⁰² In *Atkins v. Virginia*,²⁰³ Justice Stevens cited the “world community” in support of what he determined was an emerging “widespread consensus” against the death penalty for the mentally infirm.²⁰⁴ This reasoning has expanded beyond the realm of Eighth Amendment jurisprudence, along with the “evolving standards” test. In *Lawrence v. Texas*, Justice Kennedy cited a decision of the European Court of Human Rights to invalidate Texas sodomy laws.²⁰⁵ Far from anomalies, the Court has a long tradition of using foreign law to inform constitutional analysis.²⁰⁶ Foreign law has even “informed the test of “reasonableness,” a standard eminently similar to the

¹⁹⁹ See *United States v. Kilbride*, 584 F.3d 1240, 1252 (9th Cir. 2009); Boyce, *supra* note 106, at 345 (comparing American obscenity law with Canadian law, and noting that American law is vague and uncertain in comparison).

²⁰⁰ *Roth v. United States*, 354 U.S. 476, 485 (1957) (footnotes omitted).

²⁰¹ *Lain*, *supra* note 172, at 394.

²⁰² See *O'Brien*, *supra* note 26, at 105.

²⁰³ 536 U.S. 304 (2002).

²⁰⁴ *Id.* at 316 n.21, 317.

²⁰⁵ *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

²⁰⁶ See *O'Brien*, *supra* note 26, at 89.

Miller issue.²⁰⁷ This correlation is seen in cases such as *Coker v. Georgia*,²⁰⁸ *Atkins v. Virginia*,²⁰⁹ *Lawrence v. Texas*,²¹⁰ and *Roper v. Simmons*.²¹¹

The use of comparative analysis is polarizing.²¹² Justice Ginsburg has endorsed the view, going so far as to warn, “[w]e are the losers if we do not both share our experience with, and learn from others.”²¹³ Not all share this view; the international approach has been criticized by many, on and off the bench.²¹⁴ A major concern comes from subjective judicial interpretation; fears arise that subjective application of foreign law can result in countermajoritarian rule.²¹⁵ Nonetheless, there are compelling reasons for international analysis in the context of Internet pornography, mostly tied to the problems of the local standard in the digital age.²¹⁶ Unlike the issue of whether a right embedded in domestic law should apply to *domestic* conduct in light of a similar foreign law, here the issue is more compelling. Like

²⁰⁷ See *id.* at 92–93.

²⁰⁸ 433 U.S. 584, 596 n.10 (1977) (“It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.”).

²⁰⁹ 536 U.S. 304, 316 n.21 (2002) (basing decision to ban executions of mentally retarded criminals partly on consensus of “world community”).

²¹⁰ 539 U.S. 558, 576–78 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)) (relying on decisions of European jurisdictions for evidence of consensus).

²¹¹ 543 U.S. 551, 577–78 (2005) (relying partly on international authorities in holding a juvenile death penalty unconstitutional).

²¹² Justice Scalia provided a vehement dissent in *Atkins*. See *Atkins*, 536 U.S. at 347 (Scalia, J., dissenting) (observing that “the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal . . . to the views of . . . the so called ‘world community[]’ ”); see also *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (“Constitutional entitlements do not spring into existence because . . . foreign nations decriminalize conduct.”).

²¹³ Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 1 (2003).

²¹⁴ See, e.g., *supra* note 212; *infra* note 215.

²¹⁵ See Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: *Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1308–09 (2004).

²¹⁶ See Alford, *supra* note 178, at 687–88 (“Thus, in this most global of media, not a single Justice expressed the view that foreign standards were somehow relevant to regulate sex on the Internet. As a constitutional matter, the contemporary community is anything but a global village.”).

admiralty or immigration law, it involves whether domestic law applied to inherently *transnational* conduct should borrow from foreign law.

The fear of subjective application of international law can be assuaged. As with the definition of “obscenity,” an objective or methodological approach informs analysis. These fears are allayed by “limit[ing] the members of the world community whose opinions would ‘count.’”²¹⁷ This has been countered by the notion of the difficulty inherent in such a process: How can a court determine which foreign countries to “count”?²¹⁸

D. *Objective Approach to Limiting Comparative Law Sources*

A court can determine which foreign countries to count by deference to studies and statistics, much like the use of surveys in Part III and Part IV.C. There have been many studies recently regarding cultural differences across nations, quantifying and tabulated the differences for easy references. These can inform an obscenity inquiry. For example, one could look to studies relating to sexual values²¹⁹ and general cultural value studies.²²⁰ Notably, Professor Geert Hofstede’s *Cultural Dimensions* could prove to be very useful in guiding analysis because it is premised on the difference of cultural values. In looking to foreign law to inform American cultural inquiry, limiting foreign sources to those that are similar to America culturally guards against the common criticisms of comparative analysis.

In the Hofstede Study, first published in 1984, Hofstede developed five indices of cultural values: small versus large power distance; individualism versus collectivism; masculinity versus femininity; weak versus strong uncertainty avoidance;

²¹⁷ Larsen, *supra* note 215, at 1322.

²¹⁸ *Id.* at 1324.

²¹⁹ See David P. Schmitt et al., *Why Can’t a Man Be More Like a Woman? Sex Differences in Big Five Personality Traits Across 55 Cultures*, 94 J. PERSONALITY & SOC. PSYCHOL. 168, 168–72 (2008) (analyzing the sexual differences in a sample of men and women across multiple countries through personality traits, cultural value indices—including the Hofstede Study,—gender equality indices, and socioeconomic indicators).

²²⁰ See generally HOFSTEDE, *supra* note 27; David P. Schmitt et al., *The Geographic Distribution of Big Five Personality Traits: Patterns and Profiles of Human Self-Description Across 56 Nations*, 38 J. CROSS-CULTURAL PSYCHOL. 173 (2007) (comparing personality traits across cultures).

and long versus short term orientation.²²¹ These values were polled from various workers internationally.²²² While these values do not relate explicitly to the ascertainment of “obscene,” they can be used to identify nations that have similar cultural values to the United States. The Hofstede Study charts these values on an index and assigns numerical values to countries. Looking to the United States’ position in these various indices, one can then look to the closest one or two countries on both sides. By compiling a list of countries in this manner, an objective guideline can inform comparative analysis. This approach generates a list of countries that are culturally similar to the United through the use of a diverse field of different cultural value sets. This method is limited, weeds out extreme outliers, and is disciplined in focus. While the Hofstede Study approach may not be perfect, it is nonetheless substantially more guided and methodical than picking out of a hat or choosing “English speaking” countries. At the very least, it is markedly more methodical than any approach the Supreme Court has used in creating binding law on the nation when looking to international law.

The Hofstede Study values can be used to determine sexual values even more narrowly than its general application. While the Hofstede Study values were not developed to examine sexual attitudes, it nevertheless could be used in considering a limiting application of comparative analysis. Sexual attitudes are often rooted in cultural norms.²²³ Moreover, many of the index values are even closely enough related to sexuality to be delineated in the text, as in the case of the “power distance” index²²⁴ and masculinity-feminity.²²⁵ The values have been used elsewhere in sexual psychology research²²⁶ and are more objective than “nose counting.” By analogy, published studies have correlated sexual

²²¹ See HOFSTEDE, *supra* note 27, at xix–xx.

²²² See *id.* at 41–43.

²²³ Vipran K. Luthar & Harsh K. Luthar, *Using Hofstede’s Cultural Dimensions to Explain Sexually Harassing Behaviors in an International Context*, 13 INT’L J. HUM. RESOURCE MGMT. 268, 269 (2002) (noting that researchers theorize that sexual harassment is informed by cultural contexts).

²²⁴ See HOFSTEDE, *supra* note 27, at 99 (noting that high-power distance indexed countries tend to be more lenient towards under-age sex).

²²⁵ See *id.* at 329–30.

²²⁶ Luthar & Luthar, *supra* note 223.

harassment to the Hofstede Study values.²²⁷ Noticing that the United States rates similarly to Canada, the Netherlands, and Great Britain on the individuality index,²²⁸ one could then limit a comparative analysis to those countries. This can be done across all the indices to create a varied, yet precise, mode of analysis. Similar comparative studies on obscenity law have been conducted, such as comparing American obscenity law to Canadian law and finding that they are strikingly different.²²⁹ For example, looking to Canadian law, one finds a similar “community standards” test but learns that Canada employs a “national” standard.²³⁰ Using the Hofstede Study to create a list for comparison, judges can objectively determine whether American obscenity law is just or out of line with identifiable contemporary standards.

While this methodology may not be as precise as other applications of the Hofstede Study, this is only because Hofstede’s values do not include a pointed value like “prurient interest identifier.” Barring a study tailor-made to the attitudes of cultures of online pornography, the benefits of the Hofstede Study are overwhelming. Professor Hofstede used large numbers of people across a multitude of countries in his study, resulting in one of the most influential cross-cultural studies ever published.²³¹ Moreover, the proposed application of the Hofstede Study is not to identify sexual values, but to find analogous countries on a macro-level. The Hofstede Study is a reliable and practical method for amassing a list of countries with similar cultural values to America.

²²⁷ See *id.*

²²⁸ See HOFSTEDE, *supra* note 27, at 315.

²²⁹ See Boyce, *supra* note 106, at 337–38.

²³⁰ Justin A. Giordano, *The United States Constitution’s First Amendment vs. The Canadian Charter of Rights and Freedoms: A Comparative Analysis of Obscenity and Pornography as Forms of Expression*, 26 N.C. CENT. L.J. 71, 79–80 (2004).

²³¹ See Luthar & Luthar, *supra* note 223, at 272 (describing the value of the Hofstede Study); John W. Bing, *Hofstede’s Consequences: The Impact of His Work on Consulting and Business Practices*, ITAP INT’L, <http://www.itapintl.com/facultyandresources/articlelibrarymain/hofstedes-consequences-the-impact-of-his-work-on-consulting-and-business-practices.html> (last visited Apr. 7, 2012).

CONCLUSION

Pornography and obscenity has changed significantly since the Supreme Court heard *Miller v. California*. At the time, the Court delineated a workable solution to a problem that had plagued courts for years. The emergence of the Internet as a global network, and its use as a primary method of delivering pornography, however, has dulled the applicability of *Miller's* obscenity doctrine. The use of "local community" standards is unreasonable and has resulted in unfair prosecutions and the chilling of free speech. Recognizing this problem, the Ninth Circuit took an admirable step toward progress in applying a national standard to obscenity. This approach, however, does little to reduce one of the largest problems with *Miller*: subjectivity. Moreover, the national standard carries a definitional burden. The "community standards" language should be eschewed in favor of the more flexible and objective "evolving standards of decency" test from the Eighth Amendment. This test has proven workable in fields beyond the Eighth Amendment, such as sexual privacy.

Under the "evolving standards" test, international law is often consulted. To allay fears of subjective consultation, the Hofstede Study can be used to systematically approach international law. As Justice Oliver Wendell Holmes once said:

For the rational study of the law . . . the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. *It is still more revolting* if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²³²

The Supreme Court, while seemingly reluctant to consult international law for constitutional interpretation, has engaged in the practice frequently. In the case of determining the standard for Internet obscenity, there is greater reason than perhaps ever to consult international law because the allegedly obscene material exists internationally. It comes from international sources, goes to international sources, and travels

²³² Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (emphasis added).

across international networks. Echoing the words of Justice Holmes, statistics and rational methods can be used to guide the foray into international waters.

Miller is patently outdated now and has been for quite some time. Attitudes have changed since *Miller*, and many practices that were once taboos are no longer forbidden. Nonetheless, pornographers must deal with the fear of being picked at any time for prosecution, and then subjected to the most restrictive standard in the nation. While courts have been historically lethargic in adapting to technological and societal change, they can also serve as a catalyst for change. The world of *Miller* is no more, and it is time to sever, judicially and philosophically, from at least the first part of the Cerberean antique that is its rule.